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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, ET AL., *Petitioners*,

v.

ALBERTA SCHERMERHORN, ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE STATE OF FLORIDA, AS AMICUS CURIAE, JOINED AND SUPPORTED BY THE STATES OF ALABAMA, ARIZONA, IOWA, KANSAS, MISSISSIPPI, NEBRASKA, NORTH CAROLINA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND UTAH

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OPINION BELOW

The opinion of the Supreme Court of Florida here on review is officially reported at 141 So. 2d 269 (1962).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 12 of the Declaration of Rights of the Florida Constitution (§12, 25 Fla. Stat. Ann.) provides as follows:

"The right of persons to work shall not be denied or abridged on account of membership or non-

membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

Section 14(b) of the National Labor Relations Act (61 Stat. 151, 29 U.S.C. §164) provides as follows:

"Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

QUESTION PRESENTED

The question presented is whether Congress, in enacting the Taft-Hartley Act, intended to deprive the states of authority to prohibit the execution and application of agency shop contracts.

STATEMENT OF THE CASE

Appellant, a labor union representing employees of Food Fair Stores, Inc. in five Florida counties, entered into a collective bargaining contract with Food Fair containing a so-called agency shop clause which requires non-union employees, under pain of discharge, to pay to the union a sum of money equivalent to the union initiation fee, and, in addition, monthly payments equal to the regular union dues. A group of non-union employees of Food Fair Stores sought an injunction against the enforcement of this agency shop clause on the ground that it violates Article 12 of the Declaration of Rights of the Florida Constitution, popularly known as the "Right-to-Work Law." The Supreme Court of Florida held that the ageny shop clause "is

palpably and totally inconsistent with the freedom of choise contemplated by our Declaration of Rights."

The Supreme Court of Florida also considered and rejected appellant union's contention that the Florida courts are without jurisdiction in this matter because the Federal Government has, in the National Labor Relations Act, pre-empted the field. The court noted that section 14(b) of the Taft-Hartley Act preserves the jurisdiction of the states in matters involving state "Right-to-Work" provisions and concluded that:

> "It is not to be presumed that Congress would preserve to the states the field of right-to-work legislation, while, at the same time, intending that unions and management could, by the use of subterfuge of an agency shop clause, circumvent and, in effect, nullify a paramount provision of the organic law of any of the several states."

It is this holding of the Supreme Court of Florida on the federal pre-emption question which is now challenged by appellant herein.

SUMMARY OF ARGUMENT

Appellant's case rests upon the contention that section 14(b) of the Taft-Hartley Act permits the states to outlaw only agreements requiring "membership" in a labor union, and that since agency shop agreements do not require "membership" they are not within the scope of section 14(b) and remain subject to exclusive federal jurisdiction.

Such an interpretation of section 14(b) is not consistent with the legislative purposes of the National Labor Relations Act nor is it supported by the legislative history of that Act.

In the Taft-Hartley Act there is no evidence that Congress intended to pre-empt the right of states to regulate or prohibit the agency shop type of arrangement, and, in fact, the evidence is all to the contrary. The history of the National Labor Relations Act, and its amendment by the Taft-Hartley Act, is replete with evidence that Congress intended to leave the entire field of union security agreements for regulation by the states. Section 14(b) was expressly written into the Taft-Hartley Act to manifest this intention. An interpretation of section 14(b) which would exclude agency shop agreements from its intended scope would for all practical purposes render this section meaningless.

There is no conflict in the scheme of federal regulation embodied in the National Labor Relations Act and the enforcement of state laws restricting agency shop agreements, nor does enforcement of such laws impinge upon the regulatory functions of the National Labor Relations Board. There is thus no basis for concluding that the exclusive jurisdiction rule must be applied in order to avoid conflict between the federal law and such state laws.

ARGUMENT

I.

The Effectuation of the Legislative Purpose of the National Labor Relations Act Does Not Require Exclusive Federal Regulation of Agency Shop Agreements

The National Labor Relations Act as originally enacted dealt only with certain proscribed unfair labor practices by employers. It imposed no restrictions or sanctions upon the activities or conduct of labor organizations. For that reason, during the Wagner Act period the states remained free to regulate broad areas

of union conduct even though such regulation affected interstate commerce. The Federal Government had not "entered the field" and there was, therefore, no ground for the assertion of a federal pre-emption argument.[1]

It was similarly held that the Wagner Act did not undertake to regulate or protect compulsory membership agreements even though such agreements were affirmatively permitted under section 8(3) of that Act. In *Algoma Plywood and Veneer Co.* v. *Wisconsin Board*, 336 U.S. 301 (1949), the question presented was whether an order of the state board directing an employer to cease and desist from giving effect to a maintenance of membership agreement was in conflict with the federal law. The argument was made that a state cannot forbid what the federal law affirmatively permits, but in disposing of this contention the court stated:

> "The short answer is that section 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union security agreement. This is the obvious inference to be drawn from the choice of words 'nothing in this act * * * or in any other statute of the United States,' and it is confirmed by the legislative history."

After thoroughly reviewing the legislative history of the Wagner Act the court concluded that there was no intent by Congress to displace state authority with respect to regulation of union security agreements of any type.

Thus, as the law stood in 1947 when Congress undertook to revise the Wagner Act the states had power

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[1] *Allen Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (1942).

to restrict or forbid compulsory unionism agreements of all types, including the agency shop.

In the Taft-Hartley Act Congress for the first time undertook to regulate the activities of labor unions. It amended section 8 of the National Labor Relations Act so as to add to the existing list of employer unfair labor practices a new list of union unfair labor practices. In addition, because of the abuses which had grown up in connection with the closed shop, Congress determined that as a matter of National policy the closed shop should be outlawed. In order to accomplish this it simply retained the language of the original proviso to section 8(3) that:

> "Nothing in this Act, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein."

but added the following at the end of the above sentence:

> ". . . on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * * PROVIDED FURTHER, that no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

In order to dispel any possible inference that these amendments constituted an enlargement of Congress' regulatory power as respects other forms of union security agreements the further provision was added as section 14(b) proclaiming that:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or territorial law."

As will be hereinafter seen, the legislative history conclusively shows that this section was intended to make clear that the states would continue to have authority to regulate or restrict all forms of compulsory unionism agreements.

But even apart from this clear expression in section 14(b) there is nowhere in the legislative history the slightest evidence of a contrary legislative purpose, so that even if section 14(b) had not been inserted it could not logically be contended that the changes in section 8(a)(3), beyond outlawing the closed shop, extended the mantle of federal protection to other types of union security agreements. Such other forms remained, at most, permissive, because the amended section 8(a)(3), like the previous section 8(3), in the words of *Algoma,* merely disclaims a national policy hostile to the union shop or other forms of union security agreement. 336 U.S. 301, at p. 307.

This point is further reinforced by the comment in the *Algoma* opinion that:

> "... if there could be any doubt that the language of the section means that the Act shall not be

> construed to authorize any 'application' of a *union security contract*, such as discharging an employee, which under the circumstances 'is prohibited' by the State, the legislative history of the section would dispel it." [Emphasis added.]

Within the regulatory scheme thus established there is no inconsistency between federal and state jurisdiction over agency shop agreements. If the agency shop is a permitted form of union security under section 8(a)(3) it is permitted only if also permitted by state law. If the agency shop is not permitted under section 8(a)(3) it is beyond the scope of regulation by the states.

II.

The Legislative History of the Taft-Hartley Act Conclusively Shows That Congress Intended to Leave Regulation of This Form of Union Security to the States

In 1944, three years prior to the enactment of the Taft-Hartley Act, the voters of Florida adopted the Right-to-Work amendment to the Florida Constitution here involved. In that same year the state of Arkansas adopted a constitutional amendment prohibiting not only agreements requiring membership in a labor organization, but any requirement under which any employee would be "compelled to pay dues to any labor organization as a prerequisite to or condition of employment." (Constitutional Amendment No. 34, adopted Nov. 7, 1944). The state of Virginia followed suit on January 12, 1947 by adopting a statute stating in explicit language:

> "No employer shall require any person, as a condition of employment or continuation of employment *to pay any dues, fees or other charges of any kind* to any labor union or labor organization." Sec. 40-72 Virginia Code.

The state of Tennessee, on February 21, 1947, adopted the following statutory provision:

> "Section 50-210.—It shall be unlawful for any person, firm, corporation or association of any kind to exclude from employment any person by reason of such person's payment of or failure *to pay dues, fees, assessments, or other charges* to any labor union or employee organization of any kind."

On March 18, 1947 the state of North Carolina adopted a statute reading as follows:

> "Section 95-82.—No employer shall require any person, as a condition of employment or continuation of employment, *to pay any dues, fees or other charges of any kind* to any labor union or labor organization."

On March 27, 1947 a law was passed by the Georgia Legislature specifically outlawing any requirement for payment of union dues in the following language:

> "Section 54-903.—No individual shall be required as a condition of employment, or of continuance of employment, *to pay any fee, assessment, or other sum of money whatsoever* to a labor organization."

The state of Iowa on April 28, 1947 adopted a statute embodying the following language:

> "Section 736A.4.—It shall be unlawful for any person, firm, association, labor organization or corporation, or political subdivision, either directly or indirectly, or in any manner or by any means as a prerequisite to or a condition of employment to require any person *to pay dues, charges, fees, contributions, fines, or assessments* to any labor union, labor association or labor organization."

Right-to-work laws adopted by Arizona (Nov. 1946), Nebraska (Nov. 1946), South Dakota (Nov. 1946) and Texas (Apr. 1947) were similar to the Florida law in that they prohibited compulsory membership without further mention of payment of dues, fees or other charges.

Thus, at the time Congress enacted the Taft-Hartley Act on June 23, 1947, eleven states had adopted laws prohibiting compulsory unionism, and six of these expressly prohibited not only compulsory membership but also any requirement for payment of dues, fees or other charges. There is ample evidence in the legislative history of the Taft-Hartley Act that Congress was aware of these state laws and intended the language of section 14(b) to fully cover them.[2] Senator Taft, sponsor of the legislation in the Senate, and a member of the Senate House Conference which approved the final version, explained the purpose of section 14(b) as follows:

> "Many states have enacted laws or adopted constitutional provisions to make *all forms* of compulsory unionism in such states illegal. As stated in the report accompanying the Senate Committee bill, it was not the intent to deprive the states of that power * * *." Congressional Record, Senate, June 6, 1947, pg. 6675 [Emphasis added.]

The report of the managers on the part of the House stated with reference to section 13 of the House bill (H.R. 3020) and section 14 of the Conference Committee amendments:

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[2] An enumeration of state laws forbidding compulsory unionism, including those which banned payment of dues and fees, was set forth in House Report No. 245, the report on the House bill H.R. 3020.

"Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, *or other form of compulsory unionism agreement* in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions *to make all forms of compulsory unionism* in those States illegal. It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that Act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. * * * To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a provision having the same effect." (93 Cong. Rec. June 4, 1947, pg. 6378) [Emphasis added.]

Other references in Committee reports show that Congress intended section 14(b) as validating all forms of anti-compulsion statutes enacted by the States. House Report No. 245, 80th Cong., p. 34, states that by this section:

"The United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States, notwithstanding that the agreements affect commerce, and notwithstanding that the State laws *limit compulsory unionism more drastically than does Federal law.*"

House Conference Report No. 510, 80th Cong., stated:

"Under the House bill there was included a new section [14(b)] of the National Labor Relations Act to assure nothing in the Act was to be con-

strued as authorizing any closed shop, union shop, maintenance of membership, *or other form of compulsory unionism agreement* in any State where the execution of such agreements would be contrary to State law."

The consistent use of the phrase "*or other form of compulsory unionism*" throughout these reports reveals an intent to deal with the complete range of union agreements which impose compulsion on employees, and that Congress was not restricting itself to "membership" requirements. The above-quoted House Conference Report No. 510, it will be noted, lists the three forms of compulsory membership agreements, namely the closed shop, the union shop, and maintenance of membership, and then goes on to refer to "*or other form of compulsory unionism agreement.*" In view of this broad language there can be no room for doubt that Congress intended no interference with state laws prohibiting compulsory payment of dues and fees to a union. Since the agency shop is a form of compulsory unionism it must necessarily be included within the range of compulsory unionism agreements which Congress intended to reserve for state regulation.

III.

An Interpretation of Section 14(b) Which Would Exclude Agency Shop Agreements From Its Intended Scope Would For All Practical Purposes Render the Section Meaningless

While section 8(a)(3) of the NLRA authorizes employers and unions to enter into agreements requiring "membership" in the union as a condition of employment, this authorization is followed immediately by the proviso that an employer may not discharge an employee for any reason "*other than the failure of the employee to tender periodic dues and the initiation fees*

uniformly required as a condition of acquiring or retaining membership." As a result of this proviso a contract requiring membership cannot be literally enforced, that is to say, the employee who refuses to become a member of the union cannot be discharged for nonmembership. As long as he tenders to the union the amount of money representing the dues and initiation fee he can disregard the membership requirement of the union agreement. Thus in practical effect this section authorizes the employer and the union to agree on a compulsory membership requirement but not to enforce it in literal terms.

In *Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954) this Court analyzed the meaning of the word membership as used in section 8(a)(3), and concluded that this section was designed:

> "to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, *or abstain from joining any union* without imperiling their livelihood." [Emphasis added.] P. 40

The legislative history of the Act, the court added, clearly indicates:

> "that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees."

Numerous cases under this section have held that employees who have clearly expressed objections to belonging to a union, or who have dropped their union membership, cannot be discharged so long as they tender the prescribed dues and fees. *Union Starch and Refining Co.* v. *NLRB*, 186 F.2d 1008, CA 7 (1951); *NLRB* v. *Gottfried Baking Co.*, 210 F.2d 772, CA 2 (1954);

NLRB v. *Pape Broadcasting Co.*, 217 F.2d 197, CA 5 (1954); *NLRB* v. *International Assn. of Machinists*, 203 F.2d 173, CA 9 (1953). In the latter case the employee in question not only voiced strong objections to membership in the union but even started a campaign to oust the union as bargaining agent and to form a new union. Because of these activities the union refused to accept his tender of dues and caused his discharge. Such discharge was held improper by the NLRB, and its finding was affirmed by the Court of Appeals. Diligent research fails to reveal any case in which a lack of willingness to become or remain a union member was found a proper basis for discharge of an employee who had complied with the requirement for tendering dues and fees.

It is evident then that in practical application section 8(a)(3) itself prohibits enforcement of compulsory membership as a condition of employment, permitting only a requirement for payment of the prescribed amounts of money. In light of this it can be seen that if section 14(b) is construed with literal exactitude as leaving to the states only the authority to prohibit compulsory membership it would, in effect, leave *nothing* to the states because compulsory membership as a condition of employment is already prohibited by section 8(a)(3). Section 14(b), as well as the Congressional purpose in adopting this section, has meaning only if it leaves to the states the power to prohibit the same type of agreement that is permitted under section 8(a)(3) namely, agreements requiring payment of dues and fees. If it doesn't do this it does absolutely nothing, and its inclusion in the Taft-Hartley Act was meaningless. This point was incisively stated by the court in *Amalgamated Assn.* v. *Las Vegas-Reno-*

Tonopah Stage Lines, 202 F.Supp. 726, DC Nev. (1962) in ruling upon the validity of an agency shop agreement under the Nevada right to work law, as follows:

> "Although it is true that Section 14(b) literally only gives the states the right to outlaw agreements which make 'membership' in a union compulsory, we are convinced that we would be frustrating the clear congressional purpose and creating an utterly absurd result if we were to hold that literalness should be exalted to a point where the states were denied the right to ban the agency shop as well. Section 14(b) would be bereft of meaning if we were to construe it in a fashion which would render the states powerless to make illegal that type of union security agreement which imposes liabilities on the workingman which, realistically, are the same liabilities which, under the section, the states may remove."

A similar conclusion was reached by the Supreme Court of Kansas in holding that the Kansas law under which agency shop contracts were outlawed was clearly protected by section 14(b). *Higgins* v. *Cardinal Manufacturing Co.*, 188 Kan. 11 (1961), 360 P.2d 456, cert. den. 368 U.S. 829 (1962). See also, *Sheet Metal Workers International Assn.* v. *Nichols*, 89 Ariz. 187, 316 P.2d 204 (1961), and *Meade Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 NE 2d 408 (1959), in which the question of state authority to regulate agency shop clauses was similarly raised.

IV.

State Authority to Restrict Agency Shop Agreements Is Unaffected by the Pre-Emption Rule Stated in the Garmon Case

The decision of this Court in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) reiterating the broad scope of the federal pre-emption rule is cited by appellant herein to support its contention that states may not regulate or restrict agency shop agreements. That decision reversed a California state court judgment awarding damages to a lumber dealer for losses sustained as a result of picketing by unions seeking recognition as bargaining agents. The employer had originally filed an unfair labor practice charge with the National Labor Relations Board asserting that the picketing violated the NLRA, but the Board declined to exercise jurisdiction. In proceedings brought in the state court the court concluded that the union activities constituted a tort based on an unfair labor practice under state law and awarded damages accordingly. This Court, in setting aside the judgment, held that the failure of the NLRB to assume jurisdiction did not leave the State free to regulate conduct it would otherwise be prevented from regulating, and stated:

> "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by section 7 of the National Labor Relations Act, or constitute an unfair labor practice under section 8, due regard for the federal enactment requires that State jurisdiction must yield. * * * The case before us is such a case. The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California

courts from the facts as well as from their view of the Act. It is not for us to decide whether the National Labor Relations Board would have, or should have decided these questions in the same manner. When an activity is arguably subject to section 7 or section 8 of the Act, the States as well as the federal courts must yield to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." pp. 244, 245

It will be immediately noted that this case involved picketing of a type which is expressly dealt with under section 8 of the NLRA, and the regulation of which Congress has entrusted to the National Labor Relations Board.

The other pre-emption cases cited in *Garmon* similarly involved state regulation of a particular course of conduct expressly dealt with in section 8. *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953) involved picketing activity which was held clearly a violation of section 8(b) of the NLRA; *Weber* v. *Anheuser Busch*, 348 U.S. 468 (1955) involved a strike and picketing to enforce a jurisdictional dispute claim of the striking union, conduct clearly regulated under section 8(b); *Guss* v. *Utah Board*, 352 U.S. 1. (1957) involved an employer refusal to bargain with a union certified as employee bargaining agent by the NLRB; *International Union* v. *O'Brien*, 339 U.S. 454 (1950) involved a strike clearly recognized as regulated by section 8(b)(4) and section 8(d) of the NLRA; *Youngdahl* v. *Rainfair*, 355 U.S. 131 (1957) involved striking and picketing of a type unequivocally regulated by section 8, as did also *Amalgamated Assn.* v. *Wisconsin Board*, 340 U.S. 383 (1950).

In the instant case, however, the Florida courts were not dealing with any particular conduct or activity of this type. There was no strike or picketing by employees, nor any charged unfair labor practice on the part of the employer. Thus there was no independent conduct which could be said to be prohibited by the NLRA. Nor did the state court action affect any activities which the NLRA sought to protect. As previously indicated the authorization for union security agreements in section 8(a)(3) was a "permissive" rather than a "protective" proviso, adopted for the purpose of "disclaiming a national policy hostile to * * * union security agreements," as stated in *Algoma*.

For this reason also, the present case is not at all comparable to *Construction and General Laborers Union* v. *Curry*, 371 U.S. 542, (1963), which involved an injunction issued by a state court in Georgia to restrain peaceful picketing by a union for the purpose of enforcing payment of prevailing wages and the hiring of union labor. The Georgia court found that one of the purposes of the picketing was to force the employer to agree to hire only union members and was thus violative of the Georgia right to work laws' prohibition of compulsory union membership agreements. In reversing the decision of the Georgia court this Court held that "the allegations of the complaint, as well as the findings of the Georgia Supreme Court, made out at least an arguable violation of section 8(b) of the National Labor Relations Act," and consequently it was within the exclusive jurisdiction of the NLRB to adjudicate. The fact that the conduct in question also involved a violation of the Georgia right to work law, the court held, did not give the state court jurisdiction.

IBEW Local 429 v. *Farnsworth and Chambers Co.*, 353 U.S. 969 (1957); *De Vries* v. *Baumgartner Electric Co.*, 359 U.S. 498 (1959) and *Plankinton Packing Co.* v. *Wisconsin Board*, 338 U.S. 953 (1950), similarly involved conduct which, independent of the union security issue, could be regarded as unlawful under section 8 of the NLRA. The *Farnsworth* case and the *De Vries* case each involved picketing in circumstances almost identical to that present in *Construction and General Laborers Union* v. *Curry, supra.* In the *Plankinton* case the Wisconsin Employment Relations Board expressly found that both the employer and the union had engaged in unfair labor practices under sections 8(a) and 8(b) of the NLRA for the purpose of compelling an employee to acquire union membership, and that such conduct violated the provisions of the Wisconsin Employment Peace Act which prohibited compulsory union membership agreements without a two thirds vote of affected employees. A cease and desist order issued by the Wisconsin Board was set aside by this Court on the ground that the conduct in question was clearly regulated by the NLRA and thus removed from state jurisdiction.

The assertion has frequently been made that the decision in *Plankinton*, in effect, overruled the prior decision in *Algoma Plywood and Veneer Co.* v. *Wisconsin Board, supra*, which upheld the authority of the state of Wisconsin to regulate union security agreements. This contention ignores the substantive differences between the two cases. As pointed out above, *Plankinton* involved independent conduct which constituted unfair labor practices under section 8 of the NLRA. No such conduct was involved in *Algoma*, wherein the Wisconsin Board's order directing the

employer to reinstate an employee discharged under an unlawful union security agreement was held properly within the power reserved to the states under the National Labor Relations Act. In this connection it is interesting to note that *Algoma* has been cited with approval in numerous decision of this Court subsequent to the decision in *Plankinton*.[3]

In a case closely on point, *Willard* v. *Huffman*, 250 N.C. 396, 109 SE 2d, 233, cert. denied 361 U.S. 893 (1959), the Supreme Court of North Carolina considered a lower court judgment awarding damages to an employee who was discharged from his employment for non-membership in a union in violation of the North Carolina right to work law. The defendant employer contended that the discharge was an unfair labor practice under section 8(a)(3) of the NLRA, and thus subject to exclusive jurisdiction of the NLRB. After reviewing the entire range of pre-emption cases under the NLRA, the North Carolina Supreme Court stated:

> "If the courts of this state are not open for adjudication of the plaintiff's claim for damages in tort, based on his wrongful discharge, pursuant to the provisions of our Right to Work Act, then there is no forum in either the federal or state judicial systems where the plaintiff can have his rights litigated and determined. * * *
>
> "Our courts, in the case before us, are not seeking to administer the provisions of section 8(a)(1) and (3) of the Labor Relations Act, Title 29, USCA; they seek only to enforce the provisions of our own Right to Work Act, provisions which have no counterpart in the National Labor Relations Act. * * * As heretofore pointed out, our

[3] See Teamsters Union v. Oliver, 358 U.S. 283 (1959), footnote 10, p. 296.

> Right to Work Act has been held to be constitutional by this court and by the Supreme Court of the United States, *Whitaker* v. *State of North Carolina* [335 U.S. 525]"

The North Carolina Supreme Court affirmed the award of damages to the discharged employee. A petition for certiorari to review that decision was denied. 361 U.S. 893 (1959).

It may also be observed that appellants herein have attempted to attribute undue and unwarranted weight to one sentence wherein the *Garmon* decision states:

> "When an activity is arguably subject to section 7 and section 8 of the Act, the States as well as the federal courts must yield to the exclusive competence of the National Labor Relations Board."

If agency shop agreements are even "arguably" subject to section 8, appellants argue, they are thus within this broad language of *Garmon* and automatically preempted. Other portions of the majority opinion of *Garmon* disclose, however, that there are other considerations that apply. For example, the court stated (page 243):

> "When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the states of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations

Act. See *International Asso. of Machinists* v. *Gonzales*, 356 U.S. 617, 2 L.Ed. 2d 1018, 78 S.Ct. 923. *Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.*"[4] [Emphasis added.]

From the foregoing it can be quite forcefully argued that state laws regulating union security agreements deal with activities of a "merely peripheral concern of the Labor Management Relations Act" and thus under this language of the *Garmon* decision are beyond the scope of the pre-emption rule. It can perhaps be even more strongly argued that state regulation of compulsory unionism touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act."

Further evidence that the *Garmon* decision does not automatically strike down state authority in dealing with activity "arguably" within the compass of section 7 or section 8 of the National Labor Relations Act is found in the fact that this formula was not followed in the recent decision of this Court in *Smith* v. *Evening News Assn.*, 371 U.S. 195, (1962). That case involved a suit by union employees of a newspaper against the newspaper publisher to recover damages for loss of wages during a strike called by another

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[4] Citing *United Automobile Workers* v. *Russell*, 356 U.S. 634; *Youngdahl* v. *Rainfair*, 355 U.S. 131; *Auto Workers* v. *Wisconsin Board*, 351 U.S. 266; *Construction Workers* v. *Laburnum*, 347 U.S. 656.

union. The facts alleged in the complaint made out an unlawful discrimination against the union employees under section 8(a) of the National Labor Relations Act. The trial court dismissed the suit and the Supreme Court of Michigan affirmed the dismissal relying upon the *Garmon* case. The Michigan court concluded that since the conduct complained of was "arguably" within the range of sections 7 and 8 of the National Labor Relations Act the National Labor Relations Board thus had exclusive jurisdiction. Upon review, this Court ruled that the authority of the National Labor Relations Board to deal with an unfair labor practice which also violates a collective bargaining contract is not exclusive and does not destroy the jurisdiction of state or federal courts to entertain such cases.

It is also notable that the *Garmon* decision cited with approval *Machinists Union* v. *Gonzales*, 356 U.S. 617 (1958) and *Auto Workers* v. *Russell*, 356 U.S. 634 (1958), in both of which cases state court action was sustained even though the facts showed conduct arguably an unfair labor practice under section 8. In the *Gonzales* case this Court stated:

> "It might be abstractly justifiable, as a matter of wooden logic, to suggest that an action in a state court by a member of a union for restoration of his membership rights is precluded. In such a suit there may be embedded circumstances that could constitute an unfair labor practice under section 8(b)(2) of the Act.
>
> * * *
>
> "If, as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the Na-

tional Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote."

In the light of these considerations the *Garmon* decision cannot be read as imposing an absolute pre-emption formula such as appellant contends. There is no compelling congressional direction affecting agency shop agreements, and state authority to regulate such agreements remains unimpaired by the *Garmon* case.

CONCLUSION

There is nothing in the National Labor Relations Act, or in ordinary common sense, to support the conclusion that the words "as a condition of employment membership therein" in section 8(a)(3), were intended by Congress to have any different meaning than the words "membership in a labor organization as a condition of employment" in section 14(b). If these parallel phrases were intended as having different meanings it it most logical to assume that Congress would have expressly pointed out the difference.

In the absence of any such evidence reason dictates that the forms of union security that Congress intended to authorize in section 8(a)(3) are exactly and precisely the same as those which it intended to leave to the States under section 14(b). Consequently, if agency shop agreements are permitted under section 8(a)(3) they are also subject to regulation by the States under section 14(b).

If, on the other hand, the word "membership" in section 8(a)(3) is to be construed, as it has been by the Circuit Court of Appeals for the Sixth Circuit, as

authorizing only agreements which require membership, it follows that agency shop agreements must be regarded as prohibited under the federal Act, and the question of whether the States may prohibit such agreements becomes academic.

The suggestion that these same words should be construed broadly in the one case to validate agency shop agreements, but narrowly in the other so as to limit state authority to regulate such agreements, so violently assails normal logic and rules of reason that it is difficult to believe it is intended to be taken seriously.

For the foregoing reasons the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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